

LAW OFFICES OF
PAINE, HAMBLEN, COFFIN, BROOKE & MILLER LLP

DOCKET FILE COPY ORIGINAL

PARTNERS

GREGORY J. ARPIN
GARTH NICHOLAS BERGH
JERRY K. BOYD
PHILIP S. BROOKE III
DAVID I. BROOM
ROGER F. CHASE
SHAUN M. CROSS
GARY A. DAHLKE
FREDERIC G. EMRY II
PETER C. ERBLAND*
STEPHEN F. FAUST**
MICHAEL B. HAGUE*
CHRISTOPHER J. HOGSTAD***
JAMES M. KALAMON
RICHARD W. KUHLING
JOHN A. MANIX
THOMAS W. McLANE
EUGENE L. MILLER*

PATRICK E. MILLER*
ROBERT E. NEATE**
GAIR B. PETRIE*
JOHN T. POWERS, JR.
TIMOTHY W. QUIRK
JOHN C. RISEBOROUGH
AUSEY H. ROBNETT III**
JANET D. ROBNETT***
WILLIAM J. SCHROEDER
CURTIS L. SHOEMAKER
DANIEL W. SHORT
SCOTT L. SIMPSON
LAWRENCE R. SMALL
ANDREW C. SMYTHE**
DONALD G. STONE**
R. BLAIR STRONG**
KEITH A. TREFRY

717 WEST SPRAGUE AVENUE
SUITE 1200
SPOKANE, WASHINGTON 99201-3505
(509) 455-6000
FAX (509) 838-0007
E-MAIL: firm@paine-hamblen.com

ASSOCIATES

SEANNA M. BODHOLT
JANE E. BROWN
THOMAS A. DeBOER**
DALE A. DEFELICE
BRIAN L. ERNST
JESSIE L. HARRIS
JON D. FLOYD
JOHN G. GOLLER
STEPHANIE G. HOLDER
PATRICK J. KIRBY**
GERALD KOBLUK
MICHAEL B. LOVE
THOMAS L. McKEIRNAN
MARY BETH McLEOD
SCOT D. NASS*

TROY Y. NELSON**
MICHAEL T. OLSEN
MARY M. PALMER
MICHAEL J. PAUKERT**
TRAVIS L. SINES
GEOFFREY D. SWINDLER
HOLLIE J. WESTLY
ANGELA H. WILKEY

OF COUNSEL

RICHARD E. HAYES**
GREGORY S. JOHNSON
RICHARD D. McWILLIAMS
JOHN R. QUINLAN

*WASHINGTON & OREGON STATE BARS
**WASHINGTON & MONTANA STATE BARS
***WASHINGTON & CALIFORNIA STATE BARS
*IDAHO STATE BAR
**IDAHO & WASHINGTON STATE BARS
***IDAHO & OREGON STATE BARS
ALL OTHERS WASHINGTON STATE BAR

August 26, 1999

BY FEDERAL EXPRESS

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street SW
TW-A 325
Washington, DC 20554

RECEIVED

AUG 27 1999

FCC MAIL ROOM

**Re: Comments of Avista Corporation
WT Docket No. 99-217 and CC Docket No. 96-98**

Dear Ms. Salas:

Enclosed for filing find an original and six (6) copies of Comments of Avista Corporation with Respect to Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98. We would appreciate your date-stamping the extra copy and returning it to our office in the enclosed envelope.

Thank you for your assistance. If you need anything additional or have any questions, please do not hesitate to contact me at (509) 455-5066.

Very truly yours,

PAINE, HAMBLEN, COFFIN,
BROOKE & MILLER LLP

Robert E. Neate

Enclosures

cc (w/encl): International Transcription Services, Inc.

W:\11\150\02746\CVL100 - FCC.wpd:bkm

0+4
10/1/99

**Before the
Federal Communications Commission
Washington, D.C. 20554**

RECEIVED

AUG 27 1999

FCC MAIL ROOM

In the Matter of)	
)	
Promotion of Competitive Networks)	
in Local Telecommunications Markets)	WT Docket No. 99-217
)	
Wireless Communications Association)	
International, Inc. Petition for Rulemaking to)	
Amend Section 1.4000 of the Commission's)	
Rules to Preempt Restrictions on Subscriber)	
Premises Reception or Transmission)	
Antennas Designed To Provide Fixed)	
Wireless Services)	
)	
Cellular Telecommunications Industry)	
Association Petition for Rule Making and)	
Amendment of the Commission's Rules to)	
Preempt State and Local Imposition of)	CC Docket No. 96-98
Discriminatory And/Or Excessive Taxes and)	
Assessments)	
)	
Implementation of the Local Competition)	
Provisions in the Telecommunications Act)	
of 1996)	

**COMMENTS OF AVISTA CORPORATION WITH RESPECT TO
NOTICE OF PROPOSED RULEMAKING AND NOTICE
OF INQUIRY IN WT Docket No. 99-217, and THIRD FURTHER
NOTICE OF PROPOSED RULEMAKING IN CC Docket No. 96-98**

TABLE OF CONTENTS

	Page
I. Identification of Avista Corporation and its Interest	1
II. State Regulation in the Northwest as to Pole Attachments	1
III. Property Rights Are Local and Individual in Nature and Should Not Be Altered by National Regulatory Proclamation	2

I. IDENTIFICATION OF AVISTA CORPORATION AND ITS INTEREST

Avista Corporation, an electric and gas utility serving customers primarily located in the states of Washington, Idaho and Oregon, submits these comments in response to the Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (the "Notice of Proposed Rulemaking").

Comments concerning or information about this filing, or any other documents in this proceeding, are to be addressed to:

Robert E. Neate
PAINE, HAMBLIN, COFFIN,
BROOKE & MILLER LLP
717 W. Sprague Ave., Suite 1200
Spokane, WA 99201-3505
Telephone: (509) 455-6000
Facsimile: (509) 838-0007
email: rneate@paineamblyn.com

Avista Corporation has two affiliate companies engaged in certain aspects of the competitive telecommunication business. Avista Corporation therefore generally supports this Commission's efforts at promoting even-handed and fair competition for companies in telecommunication enterprises. The comments set forth below are restricted to issues concerning access under Section 224 of the Communications Act, primarily covered in paragraphs 36-48 of the Notice of Proposed Rulemaking. Avista Corporation may choose to comment further on any issue by the reply comment date of September 27, 1999.

II. STATE REGULATION IN THE NORTHWEST AS TO POLE ATTACHMENTS

Consistent with Section 224 of the Communications Act, 47 U.S.C. § 224, the utility commissions in the states where Avista Corporation provides electric service regulate pole attachment rules and fees. Such state regulation is appropriate, as it permits a relatively local

investigation and implementation of appropriate rules and practices. For example, utilities serving primarily urban regions might have facilities configured substantially differently from utilities that serve primarily rural areas. Moreover, safety and engineering issues pertaining to pole attachments might vary according to terrain, geographic and climate concerns. This regulatory framework should therefore continue.

III. PROPERTY RIGHTS ARE LOCAL AND INDIVIDUAL IN NATURE AND SHOULD NOT BE ALTERED BY NATIONAL REGULATORY PROCLAMATION

The Notice of Proposed Rulemaking acknowledges the local nature of property rights issues. A considerable portion of Avista Corporation's rights of access to property is governed by individually negotiated easements, each being a two-party agreement between the property owner and Avista Corporation. Many of those easements provide rights of access to the specific property for a specific purpose, namely for the installation or maintenance of electric facilities or natural gas facilities. Moreover, some of the property rights held by Avista Corporation were originally acquired through the exercise of eminent domain powers. Like the situation where the company's rights were obtained by franchise or private easement, such proceedings often resulted in payments designed to compensate the property owner for use of specific property for specific purposes. It is not clear what effect the Notice of Proposed Rulemaking might have on those rights, nor on the potential for property owners collecting—or being entitled to collect—additional fees.

In any event, there is no method to ascertain the “status” of Avista Corporation's “ownership or control” of property (including fee title ownership, easements, franchises and other rights-of-way) without a case-by-case, parcel-by-parcel, facility-by-facility investigation. Thereafter, in each instance where rights for third party telecommunications access are not held by Avista Corporation, individual negotiations with property owners would often be necessary to obtain the right to provide

such access to third parties. Avista Corporation's "owned or controlled facilities," as the Notice of Proposed Rulemaking employs that phrase, might well be significantly more constrained than the Notice of Proposed Rulemaking presupposes.

It appears unlikely that the Federal Communications Commission has authority to amend individual deeds, contracts or easements by a rulemaking such as the Notice of Proposed Rulemaking. Moreover, nothing in Section 224 (47 U.S.C. § 224) supports an inference that Congress intended to alter any such arrangements between utilities and property owners, nor that Congress intended to give the FCC the power to do so by regulatory fiat. Under the circumstances, it is not appropriate for an FCC regulation to attempt to override utility easements or franchises merely by employing an expansive definition of property rights. Thus, any Federal Communications Commission regulation purporting to require Avista Corporation to conduct an analysis of its property rights, and then to make various "owned or controlled facilities" available to others, should also require the telecommunications provider seeking to use such "owned or controlled" facilities to pay all costs incurred in the analysis and the use.

Accordingly, the proposed regulatory description of "owned or controlled facilities" is unduly broad. As explained above, there are potentially express and significant limits on the property rights of Avista Corporation and other similarly situated utilities. In the context of the proposed rulemaking, the most appropriate method to recognize the limited nature of Avista Corporation's property rights (or such rights of other similarly situated utilities) is through indemnification. Thus, if an installation of telecommunications facilities occurs as a result of an FCC rule, and that installation violates the applicable franchise, easement or property right, the utility holding the property rights or facilities used for the installation should be indemnified and held harmless by the telecommunications provider that installed the telecommunications facilities.

This issue cannot be addressed solely through lease payments, pole attachment fees, or the like, as improper or unauthorized use of a property right might invoke remedies beyond money damages.

Finally, depending upon the particular situation, it may also be the case that location of communications facilities will involve safety considerations pertaining to the electric or natural gas facilities. All such concerns should be handled locally, by the individual electric or natural gas utility involved, consistent with applicable local or state regulatory requirements. There is no legitimate basis, nor any compelling need, for the Federal Communications Commission to attempt to trump such standards or requirements in the context of promoting competition in the telecommunications business.

Dated this 26th day of August, 1999.

PAINE, HAMBLIN, COFFIN,
BROOKE & MILLER LLP

By: 

Robert E. Neate
717 W. Sprague Ave., Suite 1200
Spokane, WA 99201-3505
Telephone: (509) 455-6000
Facsimile: (509) 838-0007
email: rneate@painehamblin.com

Attorneys for Avista Corporation

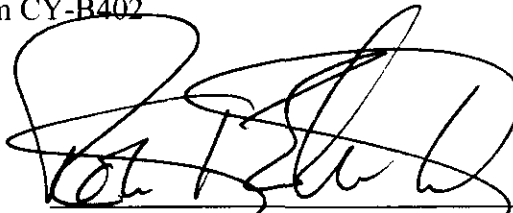
CERTIFICATE

I hereby certify that on August 26, 1999, I caused the original and six (6) copies of the foregoing document to be sent via Federal Express, for next day delivery, to:

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street SW
TW-A 325
Washington, DC 20554

and an additional copy to:

International Transcription Services, Inc.
445 12th Street SW, Room CY-B402
Washington, DC 20554

A large, stylized handwritten signature in black ink, appearing to read 'Robert E. Neate', is written over a horizontal line.

Robert E. Neate
PAINE, HAMBLIN, COFFIN,
BROOKE & MILLER LLP
717 W. Sprague Ave., Suite 1200
Spokane, WA 99201-3505